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AGENDA ITEM

For Meeting of: 2-14-05

SUBMITTED LATE

MEMORANDUM TO THE COMMISSION

From: Commissioner Ellen L. Weintraub *ELW*

Subject: AO 2004-43 Alternative Draft

Date: February 11, 2005

Attached please find a redraft of the Office of General Counsel's draft AO 2004-43. Based on my own views and those expressed to me by my colleagues, there does not appear to be majority support for the OGC draft. Accordingly, I propose the following draft as an attempt to bridge Commissioners' individual concerns with the OGC draft and therefore, allow us to provide an answer, albeit a narrow one, to the requestor.

1 **ADVISORY OPINION 2004-43**

2
3 Gregg P. Skall, Esq.
4 Womble, Carlyle, Sandridge & Rice, P.L.L.C.
5 Seventh Floor
6 1401 Eye Street, N.W.
7 Washington, D.C. 20005

8
9 Dear Mr. Skall:

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11 We are responding to your advisory opinion request on behalf of the Missouri
12 Broadcasters Association ("MBA") regarding whether, under the Federal Election
13 Campaign Act of 1971, as amended ("FECA"), a broadcaster would be making a
14 corporate in-kind contribution by selling advertising time at the Lowest Unit Charge
15 ("LUC")¹ to a candidate who may have failed to include a fully compliant
16 Communications Act Statement in one of his advertisements and, therefore, may not be
17 entitled to the LUC under section 315(b) of the Communications Act. 47 U.S.C. 315(b).

18 ***Background***

19 The facts of this request are presented in your letter of October 29, 2004, as
20 supplemented by your letters of November 19, 2004, January 21, 2005, and February 8,
21 2005.

22 MBA is a voluntary association of broadcasters who are Federal Communications
23 Commission ("FCC") licensees of radio and television stations throughout Missouri. In
24 its request, MBA asks the Federal Election Commission ("FEC") to assume that Senator
25 Christopher Bond's advertisements did not contain a fully compliant Communications
26 Act Statement and that he therefore was not entitled to the LUC. The MBA then asks

¹ The LUC is the lowest advertising rate that a station charges other advertisers for the same class and amount of time for the same period. See 47 U.S.C. 315(b)(1) and 47 CFR 73.1942(a)(1).

1 about the legal consequences of a broadcaster having nonetheless afforded the benefits of
2 the LUC to Senator Bond.

3 FECA prohibits any corporation from making any contribution or expenditure in
4 connection with a Federal election. 2 U.S.C. 441b(a). FECA and Commission
5 regulations define the terms "contribution" and "expenditure" to include any gift of
6 money or anything of value for the purpose of influencing a Federal election. 2 U.S.C.
7 431(8)(A)(i) and 431(9)(A)(i); 11 CFR 100.52(a) and 100.111(a); see also 2 U.S.C.
8 441b(b)(2) and 11 CFR 114.1(a)(1) (providing a similar definition for "contribution or
9 expenditure" with respect to corporate activity). Commission regulations further define
10 "anything of value" to include all in-kind contributions and state that, unless specifically
11 exempted under 11 CFR 100.71(a), the provision of any goods or services (including
12 advertising services) without charge, or at a charge which is less than the usual and
13 normal charge for such goods or services, is a contribution. 11 CFR 100.52(d)(1); see
14 also 11 CFR 100.111(e)(1).

15 The Bipartisan Campaign Reform Act of 2002, P.L. 107-155, 116 Stat. 81 (March
16 27, 2002) ("BCRA"), amended section 315 of the Communications Act of 1934, 47
17 U.S.C. 315(b), such that a Federal candidate "shall not be entitled" to the LUC if any of
18 his advertisements make a direct reference to his opponent and fail to contain a statement
19 identifying the candidate and stating that the candidate approved the communication (the
20 "Communications Act Statement"). For radio broadcasts, the Communications Act
21 Statement must consist of a personal audio statement by the candidate identifying himself
22 and the office sought, and stating his approval of the message. In the case of television
23 advertisements, for a period of no less than four seconds at the end of the ad, there must

1 appear simultaneously (i) a clearly identifiable photographic or similar image of the
2 candidate; and (ii) a clearly readable printed statement, identifying the candidate and
3 stating that he has approved the broadcast and that his authorized committee paid for the
4 broadcast.

5 BCRA also amended section 441d of FECA to include a similar, though not
6 identical, required statement in political advertisements (the "FECA Statement"). The
7 FECA Statement for any radio advertisement, whether or not the ad mentions a
8 candidate's opponent, requires the candidate to identify himself, and state that he
9 approved the message. The FECA Statement does not require a candidate to state the
10 office he is seeking. For any television advertisement, the FECA Statement requires a
11 candidate to identify himself and state that he approved the communication. This must
12 be done either (1) while an unobscured, full-screen view of the candidate is displayed, or
13 (2) by means of a voice-over by the candidate, accompanied by a clearly identifiable
14 photographic or similar image of the candidate. The statement must also appear in
15 writing at the end of the communication in a clearly readable manner with a reasonable
16 degree of color contrast between the background and the printed statement, and for a
17 period of at least four seconds. 2 U.S.C. 441d(d)(1); *see also* 11 CFR 110.11(c)(3).

18 Although the Communications Act generally requires broadcasters to charge
19 candidates the LUC for a candidate's political advertisements in the 45 days preceding a
20 primary election and the 60 days preceding a general election, BCRA amended 315(b) of
21 the Communications Act to provide that a Federal candidate "shall not be entitled" to
22 receive the LUC if any of his advertisements failed to include a fully compliant
23 Communications Act Statement. 47 U.S.C. 315(b). Specifically, once a broadcaster airs

1 a Federal candidate's political advertisement that does not contain a fully compliant
2 Communications Act Statement, that candidate is no longer guaranteed the LUC for any
3 advertisement aired in the remaining days leading up to the election.

4 ***Questions Presented***

5 *Does a broadcaster make an in-kind contribution by charging a Federal candidate*
6 *the LUC for advertising time when the candidate may not be "entitled" to the LUC*
7 *under the Communications Act? If the LUC is an in-kind contribution, must the*
8 *broadcaster re-bill the candidate for the difference between the LUC and some higher*
9 *rate?*

10 The Commission concludes that a broadcaster's decision to offer Senator Bond
11 the LUC under these circumstances did not result in an in-kind contribution under FECA
12 and Commission regulations.

13 The Commission has reviewed the ads provided by MBA and has concluded that
14 there is no violation of any disclaimer requirement over which the Federal Election
15 Commission has jurisdiction. The Commission notes that the disclaimer requirements in
16 the Federal Election Campaign Act are substantially similar to those in the
17 Communication Act, and that the FEC has substantial expertise in evaluating disclaimer
18 issues. Moreover, the FCC has not, to our knowledge, come to a contrary conclusion,
19 either through evaluation of the merits in this case or by promulgating regulations (under
20 the disclaimer provisions of the Communications Act) that would warrant a different
21 result.

1 Because the Commission concludes that there is no evidence of a violation of the
2 disclaimer requirements, providing the LUC did not, in this instance, result in an in-kind
3 contribution. The Commission need not reach your question regarding re-billing.

4 The conclusion in this response constitutes an advisory opinion concerning the
5 application of the Act and Commission regulations to the specific transaction or activity
6 set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that if there is
7 a change in any of the facts or assumptions presented, and such facts or assumptions are
8 material to a conclusion presented in this advisory opinion, then the requestor may not
9 rely on that conclusion as support for its proposed activity.

10

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Sincerely,

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13

Scott E. Thomas

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Chairman